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SUPREME COURT OF APPEALS OF VIRGINIA.

COMMONWEALTH ex rel VICARS v. WAMPLER et al.

September 14, 1905.

[51 S. E: 737.]

JUDGMENT—ASSIGNMENT—BREACH OF OFFICER'S DUTY—RIGHT OF ASSIGNEE
TO SUE THEREFOR.

The statute making choses in action assignable, and authorizing an assignee to maintain in his own name any action which the original obligee might have brought, does not authorize an assignee of a judgment to maintain an action against an officer and the sureties on his official bond for a breach occurring prior to the assignment, by reason of the officer's failure to return a forthcoming bond taken on the judgment as prescribed by statute to give the bond the force of a judgment against the obligors; the statute not investing in assignees as an incident to assignments a litigious right against a third person for an injury which accrued prior to the assignment.

Error to Circuit Court, Wise County

Action by the Commonwealth, on the relation and for the use of A. M. Vicars, against W. G. Wampler and others. Judgment for defendants, and plaintiff brings error. *Affirmed.*

Vicars & Perry, for plaintiff in error.*Ayers & Fulton*, for defendants in error.

WHITTLE, J.:

The single question presented by this record is whether the assignee of a judgment is entitled to maintain an action for damages against an officer and the sureties on his official bond for a breach of the condition thereof which occurred prior to the assignment, by reason of his failure to return a forthcoming bond taken upon the judgment within the time and in the manner prescribed by statute to give such bond the force of a judgment against the obligors therein.

Upon demurrer to the declaration the trial court resolved that question in the negative, and rendered judgment for the defendants. Whereupon the plaintiff brings error.

The authorities are generally agreed that the assignment of a judgment carries with it "the cause of action on which it was based, together with all the beneficial interest of the assignor in the judgment and all its incidents." Freeman on Judgments, sec. 431.

Upon the same principle the assignment of a note carries with it all securities provided for its payment.

The doctrine is founded upon the theory that the debt is the principal thing and the security an accessory. They are not severable, and the security passes by virtue of the assignment as an inseparable dependent incident. *Carpenter v. Longan*, 16 Wall. 271, 21 L. Ed. 313.

It will be observed that the present inquiry does not involve the power of the judgment creditor to assign the right of action in question, but whether that right passed to the assignee as an incident to the assignment of the judgment.

Citizens' National Bank v. Loomis, 100 Iowa, 266, 69 N. W. 443, 62 Am. St. Rep. 571, is the only case to which our attention has been called which directly sustains the pretension of the plaintiff in error. In that case it was held that "the assignment of a judgment in an action in which an attachment has been allowed and property seized thereunder passes to the assignee the judgment creditor's right to recover damages of the sheriff for negligence in the care of property seized by allowing a disposition to be made of it."

The reasoning upon which that decision is based is not satisfactory. It proceeds upon the false premise that the right to sue for the breach of official duty must exist somewhere, and as the assignor cannot sue, having parted with the judgment, the right of action must rest in the assignee. Again, it is assumed that the right to sue for the previous dereliction of the officer is a necessary incident to the judgment; and therefore, under the principle adverted to, passed by the assignment.

Bouvier, in defining the word "incident," observes:

"This term is used both substantively and adjectively of a thing which, either usually or naturally and inseparably, depends upon, appertains to, or follows another that is more worthy. For example, rent is usually incident to a reversion (1 Hill, R. P. 243); while the right of alienation is necessarily incident to a fee simple at common law, and cannot be separated by a grant (1 Washb. R. P. 54). So a court baron is inseparably incident to a manor, in England. Kitch. 36; Co. Litt. 151.

"All nominate contracts and all estates known to common law have certain incidents which they draw with them and which it is not necessary to reserve in words. So, the costs incurred in a legal proceeding are said to be incidental thereto." 1 Bouv. L. D. (Rawle's Rev.) 1006.

It will be seen from the foregoing definition and illustrations, that the distinguishing characteristic of an incident consists in the fact that it "usually or naturally and inseparably depends upon, appertains to, or follows" its principal.

The distinction as to what does and what does not pass by incidental assignment is in some instances nice and difficult to draw; but in order for it to pass the incident must in a legal sense constitute a security for the debt, and that can hardly be predicated of a mere collateral right of action against a public officer for a *quasi* tort in failing to discharge an official duty, although his misconduct may affect the value of the judgment.

Accordingly, the Supreme Court of Kentucky, upon a similar state of facts, held "that the assignment of a judgment could not operate to transfer the right to recover for such an injury, for a right to compensation for such an injury and the right to the judgment are separate and distinct rights. They are separate and distinct, not only in their

origin and nature, but in relation to the persons against whom they must be asserted. The right to compensation for the injury may, indeed, be said to be incident to the right to the judgment in one sense, for it must necessarily belong to the person who was entitled to the judgment at the time the injury was done, but it is clearly not such an incident as must necessarily pass by the assignment of the judgment." *Com'th, for, etc., v. Fuqua*, 3 Litt. (Ky.) 41.

In *Redmond v. Staton* (N. C.), 21 S. E. 186, it was held that: "The clerk of the court is liable for damages to a judgment creditor arising from his failure to properly index the judgment, so as to render it a lien on the judgment debtor's lands. The mere assignment of a judgment does not carry with it a right of action which has accrued to the judgment creditor against the clerk of the court for his failure to properly index the judgment, so as to render it a lien on the judgment debtor's lands." The court then cites with approval the case of *Timberlake v. Powell* (N. C.) 5 S. E. 410, as analogous authority, where the court says: "The present suit is not upon the judgment, but upon an alleged independent liability incurred by other tort-feasors. . . . The cause of action is separate and distinct from that involved in the former adjudication, and is outside the scope of the assignment."

In *Robinson v. Town*, 30 Ga. 818, the court held that the assignment of the judgment did not pass any interest in the money which the sheriff had previously collected on the judgment. The court, at page 821, observes: "It was said that the plaintiffs could not maintain the suit, because they had parted with their interest by the assignment. They did part with their interest in the further enforcement of the judgment, but not with their interest in their money which the sheriff had previously collected. The assignee acquired, and they lost, the right to enforce the judgment as it stood at the time of the assignment; that is, the right to collect what was still due at the time of the assignment out of the defendants in it. Money previously collected and held by the sheriff would not be reached by the exercise of the assignee's right of enforcing the judgment, for such money was the fruit of the previous enforcement of the judgment to that extent. Such money constituted a debt due from the sheriff to the plaintiffs, to be enforced by a rule or suit against him."

While the Virginia statute has enlarged the rule of the common law so as to make choses in action assignable, and authorizes the assignee to maintain in his own name any action which the original obligee, etc., might have brought, it does not create new causes of action, and has no application to cases in which there is no assignment.

It would, in our judgment, be impolitic to extend the scope of the statute by judicial construction, so as to allow the assignment of a chose in action to invest in the assignee, as an incident, a litigious right against a third party to recover damages for an injury which accrued prior to the assignment.

The conclusion reached in this case is not in conflict with the decision in *National Valley Bank v. Hancock*, 100 Va. 101, 40 S. E. 611, 57 L. R. A. 728, 93 Am. St. Rep. 933, where the court recognizes the established general doctrine that a mere right *in litem* is not the subject of incidental assignment, but enforces a qualification of the rule called for by the facts of the particular case. In that case the debtor, without consideration, in the interest of his children, divested himself of property to the prejudice of creditors. The diversion as to them was void, and hence they, or their assignees, had the right to follow the property or its proceeds and subject it to their debts in the hands of the alienee. The debtor's individual liability and diverted property were securities for the debt, and passed as incidents to the assignment.

The case under consideration is wholly different. The effect is, not to hold the debtor or his property liable, but to maintain an action to recover damages on an individual liability of a third person to the judgment creditor.

The judgment complained of is without error, and must be affirmed.

NOTE.—In the above case, the court holds that the right to sue a sheriff or other officer on his official bond for a breach of duty in regard to a judgment is not an incident of the judgment, and that Sec. 2860, Va. Code 1904, authorizing an assignee to maintain in his own name any action which the original obligee might have brought, does not authorize an assignee of a judgment to maintain an action against an officer and the sureties on his official bond for a breach occurring prior to assignment, by reason of the officer's failure to return a forthcoming bond taken on the judgment as prescribed by statute to give the bond the force of a judgment against the obligors.

In *Citizens' National Bank v. Loomis*, 100 Iowa, 266, 69 N. W. 443, 62 Am. St. Rep. 571, cited by the court, the exactly opposite conclusion was reached. Of this case, Whittle, J., speaking for the court, says: "The reasoning upon which that opinion is based is not satisfactory. It proceeds upon the false premise that the right to sue must exist somewhere, and as the assignor cannot sue, having parted with the judgment, the right of action must exist in the assignee." If it be *false* that the right to sue must exist *somewhere*, it necessarily follows that the right of action exists *nowhere*, that is, it is *in nubibus*. If, as the court says, it is impolitic to extend the scope of the statute by judicial construction, so as to allow the assignment of a chose in action to vest in the assignee, as an incident, the right to recover against the officer for a breach of duty occurring previous to the assignment, what may be said of the policy of the construction which holds that the assignment of one right not only destroys another but also relieves officers of the law of penalties denounced against them for failure to carry out their official obligations? The cause of the judgment was the wrong committed by the defendant in the suit. By official neglect, he has been permitted to make way with the property subjected to the judgment. But the plaintiff has been indemnified by selling the judgment to the assignee. The only person, therefore, who suffers is the assignee, who purchased the judgment on the assumption that officers of the law do their duty. The defendant has escaped the consequence of his wrongful action and the officer has been relieved of the penalty for his omission to do his duty.

While the court in terms declares that Sec. 2860, Va. Code 1904, allowing the assignee of a chose in action to bring any suit which the original obligee might have brought, does not apply, no reference is made to Sec. 180, Va. Code

1904, providing that suits may be prosecuted upon any bonds taken by courts and officers in the name of the Commonwealth for "the benefit of any person injured by any breach of the condition of such bond as often as any such breaches may be alleged until damages shall be recovered for such breaches equal to the penalty of the bond." The effect of the decision in the principal case is that the assignee of the judgment cannot have been injured by an omission of the officer occurring previous to the assignment, but that such omission is a latent defect in the judgment for which the original holder thereof could have sued, but for which the assignee cannot. The court says that Sec. 2860 does not create new causes of action and has no application to cases in which there is no assignment. A corollary of this decision, therefore, is that the right to sue the officer must be specifically assigned, in order to give the assignee all the rights of the assignor. The practical difficulty would be in ascertaining that there had been some omission on the part of the officer. If a general assignment of the right to sue officers for breaches of official duty in regard to a judgment is sufficient to allow the assignee to recover in a specific case, this practical difficulty can be easily surmounted; but if a general assignment is not sufficient, then one should hesitate to obtain possession of judgments for valuable consideration.

In our view, the decision is opposed not only to the fair intendment but to the letter of the statute also, and we think that this can be shown by direct inference from other decisions of the same court. The ruling consideration should be: Could the assignor ("the original payee, obligee or contracting party") have brought before assignment the action in this case? Manifestly, yes. In *Etheridge v. Parker*, 76 Va. 247, and *Stebbins v. Bruce*, 80 Va. 389, it was held that the assignee of a non-negotiable chose in action stands in the shoes of the assignor and takes it subject to the debtor's equities against the assignor. If he stands in the assignor's shoes as to the assignor's burdens, why should he not stand for all purposes—that is, vested with all of his rights as well as his burdens? Again, in *Aylett v. Walker*, 92 Va. 540, it was held that the assignee may maintain in his own name all actions which his assignor could have maintained. Now if this is the criterion, then the present decision imposes another qualification, and the suggestion in the opinion of the impolicy of extending the statute by judicial construction is reasonably open to the counter-suggestion of the impolicy of narrowing it in the same way. Of course the old conflict as to the nature of the statute will arise at this point. If it be a departure from the common law, as it in fact is, the construction should be strict; but if it be remedial, as with equal truth it is, then the construction should be liberal. That the Court leans to the latter view in such cases abundantly appears from its ruling in *Bristol v. Thomas*, 93 Va. 396, to the effect that the right to perfect an inchoate mechanic's lien, existing in a contractor under section 2475 of the Code, is assignable, and that the lien follows the assignment. Said the Court: "As a general rule, under our law, any contractual right is assignable and the assignment carries with it all liens given for its security. As a rule, a man may authorize another to do for him whatever he may himself lawfully do. Sections 2475 and 2476 are silent upon the right to make an assignment. The exact question is, for the first time, presented to this court for decision, and we feel free to adopt that construction which commends itself to us as reasonable and just."

A fortiori, then, it would seem, if an assignment carries with it an imperfect lien it should carry with it a mere right of action, which action the assignor could admittedly have maintained—but the court holds otherwise.

It seems to us that this decision discovers a defect in the law which should be remedied by the General Assembly.

C. B. G.